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No.

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IN THE

Supreme Court of the United States

October Term, 1982

ALBERT PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Does Local Rule § 0.23 of the Rules of the Court of Appeals for the Second Circuit which provides that certain opinions may not be cited in unrelated cases and which purports to strip such opinions of precedential value violate the Due Process Clause or Article III of the Constitution?

II. Did the admission into evidence of a hearsay statement under the co-conspirator exception to the hearsay rule without any determination by the trial court that a conspiracy existed, that it was in existence at the time the statement was made, that the declaration was made in furtherance of the conspiracy and that the declarant and the defendant participated in the conspiracy constitute error under Fed. R. Evid. 801(d)(2)(E) or violate petitioner's rights under the Confrontation Clause of the Sixth Amendment?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, decided January 24, 1983 and filed February 22, 1983, which is not yet reported, is reprinted in the Appendix at A-1. The order denying rehearing, dated March 9, 1983, is reprinted in the Appendix at B-1.

JURISDICTION

a) The judgment of conviction was rendered on July 7, 1982.

b) The order of affirmance of the United States Court of Appeals is dated February 22, 1983. The order and judgment denying rehearing is dated March 9, 1983.

c) Jurisdiction to review the judgment by certiorari is conferred under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

On May 17, 1982, petitioner Albert ("Abbe") Perez was tried before the Hon. Milton Pollack and a jury on four charges contained in two indictments. The first indictment contained three counts which involved Perez. Count 1 charged petitioner, along with others, with conspiracy to distribute narcotics in New York City during the period 1971 to 1973. Seven overt acts were set forth; none of them mentioned petitioner. A second count charged petitioner with possession in October 1971 of two kilograms of heroin, with intent to distribute or to sell; a third count charged petitioner with distributing 121.7 grams to cocaine to an undercover agent in November 1971. A separate indictment charged appellant with bail jumping eight years later, in 1979.

The jury acquitted petitioner of the two substantive narcotics counts, and

convicted him of conspiracy and bail jumping. On July 7, 1982 Judge Pollack sentenced petitioner to twelve years imprisonment and a $25,000 fine on the conspiracy count and three years on the bail jumping count, to run consecutively. Petitioner did not challenge the bail jumping conviction on appeal and does not do so here.

On appeal to the Court of Appeals for the Second Circuit, petitioner raised several challenges to the validity of his conviction, one of which he raises in this petition for certiorari. He argued on appeal that it was error of both evidentiary and constitutional dimensions for the trial court to have admitted into evidence, over objection, hearsay testimony of Barry Lipsky that Vincent Pacelli allegedly told Lipsky that petitioner was Pacelli's partner in a narcotics operation. Petitioner argued

in the Court of Appeals that the trial court, which had admitted the evidence over objection and "subject to connection" had failed to rule that the predicates to admission under the co-conspirator exception to the hearsay rule -- (1) that a conspiracy existed; (2) that the conspiracy was in existence at the time the statement was made; (3) that the statement was made in furtherance of the conspiracy; and (4) that both the declarant and the defendant participated in the conspiracy -- had been established through independent non-hearsay evidence. Citing Krulewitch v. United States, 336 U.S. 440 (1948), petitioner urged that Pacelli's statement was not made in furtherance of the conspiracy and that the independent evidence failed to establish that petitioner was a member of the conspiracy charged. Petitioner argued in addition that the admission of the

challenged hearsay violated his Sixth Amendment right to confrontation, because there were not sufficient "indicia of reliability" to satisfy the truth determining process without cross-examination, because the prosecution had not established the unavailability of the extra-judicial declarant, and because the hearsay was both crucial to the prosecution and devastating to the defense.

On January 24, 1983, the Court of Appeals affirmed the judgment of conviction by summary order and statement pursuant to its Local Rule § 0.23. Petitioner moved for rehearing or rehearing en banc on the grounds that the disposition of the appeal by non-citable, non-precedential "statement" rather than by formal opinion violated petitioner's rights under the Constitution and under the federal common law. Petitioner asked

that the statement be vacated, and that the appeal be heard by another panel. By order dated March 9, 1983, the Court of Appeals rejected petitioner's challenge to Local Rule § 0.23. That Court, however, erroneously construed the motion for reargument as a motion for publication of the Court's summary order and "statement" and granted that relief. But, taking away with one hand what it had given with the other, the Court insisted that, because the case had been decided by summary order, the decision accompanying it is nevertheless still not to be cited and still caries no precedential weight. A footnote was inserted in the opinion to be published making that explicit. The motion for rehearing en banc was denied.

I. The Court of Appeals' "No Citation - No Precedent" Rule Violates the Due Process Clause of the Constitution

In recent years, the caseload of the federal appellate courts has grown rapidly. In response to the pressures created by that growth, the Courts of Appeals have adopted a variety of procedures designed to streamline the process of adjudicating disputes. One of the most controversial of the recent innovations is the adoption by many courts of rules that determine which opinions shall be released for publication. In most instances, corollary rules bar or limit the citation of unreported opinions and purport to strip such opinions of precedential value.

Local Rule § 0.23 of the Court of Appeals for the Second Circuit provides:

> The demands of an expanding caseload require the Court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in

> which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order. ... Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.

Although the Court of Appeals has now decided to publish its opinion in this case and it will, therefore, be uniformly available to all parties, the Court, citing O'Hara v. Long Island Railroad, 665 F.2d 8 (2d Cir. 1981), nevertheless asserts that the decision has no precedential value and that it may not be cited in unrelated cases.

This Court has never ruled on the validity of these or similar no publication, no citation, or no precedent rules. In Browder v. Director, Illinois

Dept. of Corrections, 434 U.S. 257, 258 n.1 (1978), the question was left for another day. The time, however, has come for this Court to take a hard, close look at these rules which, however well-intentioned, fly in the face of the most basic principles underlying the operation of our judicial system.

The impetus for the promulgation of no-publication rules is well known. Proponents claim that they are essential for reasons of judicial economy.

Appellate decisions, however, serve two functions. The first is the dispute-settling function, to dispose of litigation, correct district court and agency errors, and explain the result to the parties and the decisionmakers below. The second function, the law making function, is to establish law, explain changes in and interpretations of the law to the legal and nonlegal communities,

comment upon legal and social problems, and criticize existing legal doctrines. See generally W. Reynolds & W. Richman, The Non-Precedential Precedent -- Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Colum. L. Rev. 1167, 1182-83 (1978). Neither function is enhanced by no-publication, no-citation rules. In fact, both functions are fundamentally compromised. The proper functioning of the appellate process requires that cases and controversies be resolved exclusively by opinions which do have precedential value and which can be cited by other litigants.

Rules providing for limited publication have at least four serious negative consequences.

> First, limited publication reduces judicial responsibility by removing the constraints that stare decisis places upon the court. The concept of precedent cautions as well as

> governs. If an opinion is not to be published, unwise things may be said without fear that the corpus juris will be adversely affected. Judicial responsibility also may be diminished if courts use the nonpublication list as a repository for troublesome cases presenting issues the court does not wish to address in public. Again, nonpublication may permit judges to approach their jobs more routinely, without the real thought and effort that precedential decisionmaking requires. The final counterargument to limited publication recognizes the role played by the availability of opinions in holding judges accountable for their actions. If "[s]unlight is said to be the best of disinfectants," L. Brandeis, Other People's Money 92 (1914), then limited publication may permit sores to fester.

W. Reynolds & W. Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U. Chi. L. Rev 573, 581-82 (1981) [hereinafter "Price of Reform"].

The no-citation aspect of the rule is particularly problematic. It is argued that the prohibition on citation is part

and parcel of the limited publication approach, for without such a prohibition, its goals could easily be frustrated. If citation were freely permitted, both litigants and judges would be unable to realize the protential time savings from not having to read unpublished opinions. In addition, it is asserted that the prohibition on citations is necessary to prevent unfairness arising from the ability of well-heeled litigants to monitor, store, and use unpublished opinions more readily than other litigants. Price of Reform, supra, at 581-82.

The economies realized, either in theory or in practice, cannot, however, justify a no publication, no citation rule.

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might

> fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972).

The danger to civil liberties inherent in the non-precedential "statement" approach is that the Court can act in an ad hominem manner against a particular defendant by not applying general principles of law capable of uniform application. This danger is particularly acute in certain categories of cases, of which this is a paradigmatic example.*

* The Government asserts that this case involves organized crime and hard drugs; it is widely believed among experienced members of the criminal defense law that such cases are often treated differently by the prosecution and by the courts.

The no citation rule is vulnerable to attack on at least four grounds. First, citation of unreported decisions is essential to the functioning of the federal judicial system and the proper relationship between the district and appeals courts when the opinions establish or clarify the law in a Circuit. Second, such rules can create difficulties in appeal; where an opinion is not precedent, the primary reason for this Court's exercise of its discretionary jurisdiction is virtually eliminated. Cf. Taylor v. McKeithen, 407 U.S. 191 (1972). Third, they may lead to undetected and unresolved conflicts; inconsistent results among panels within a circuit or between circuits may arise and yet be virtually undiscoverable. And finally, the rules raise most serious questions of due process and equal protection. See Note, Unreported Decisions in the United States

Courts of Appeals, 63 Cornell L. Rev. 128 (1977) [hereinafter "Unreported Decisions"].

The Court of Appeals for the Seventh Circuit, rejecting a constitutional challenge to its no citation rule, has stated:

> In the last analysis [petitioners'] case against the rule is grounded in the doctrine of stare decisis which ... is a judicially-created policy; it is not enshrined in the Constitution.

Respondent's Brief in Opposition to Petitioners' Motion for Leave to File a Petition for Writs of Mandamus and Publication, Do-Right Auto Sales v. U. S. Ct. of Appeals for the 7th Cir., 429 U.S. 917 (1976) quoted in Unreported Decisions, supra. In contrast, the Court of Appeals for the Fourth Circuit has taken a different approach, upholding a no publication rule but acknowledging that "any decision is by definition a

precedent, and ... we cannot deny litigants and the bar the right to urge upon us what we have previously done."

Jones v. Superintendent, 465 F.2d 1091 (4th Cir. 1972).

This Court has said:

> We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychological need to satisfy reasonable expectations.... [S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable....

Helvering v. Hallock, 309 U.S. 106, 119 (1940) (Frankfurter, J.). And, as Justice Douglas wrote:

> There will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon. Stare decisis provides some moorings so that men may trade and arrange their affairs with confidence. Stare decisis serves to take the capricious element out of law and to give stability to a society.

Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736 (1949).

The Court of Appeals' rule banning citation in that Court or any other Court of its written "statements" accompanying summary orders and its stripping of those statements of precedential value raises the most basic questions concerning the function and integrity of the federal judicial system. The decision in thes case -- replete with unreasoned and conclusory rejection of petitioner's meritorious contentions -- exemplifies the

dangers of this practice.* The rule must be invalidated by the Court, as a violation of the Due Process Clause and Article III of the Constitution. This

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* One striking example of a statement made by the Court which -- for understandable reasons -- would probably not appear in a precedential opinion is the following listing of alleged corroboration by one Emily Flores of the contention that petitioner was linked to a drug-dealing conspiracy: "Emily Flores, Perez' former girlfriend, testified that whenever Perez and Pacelli met at Perez' apartment for conversations, they would ask her to leave the room (Tr. 303-304); that Perez never told her what he did for a living (Tr. 331-332); and that she had personally seen Perez use cocaine (Tr. 315)." The implication of this reasoning would indeed be frightening <u>if</u> it could be used as precedent. It would mean that allegations of drug-dealing are <u>corroborated</u> by testimony that 1) the defendant was a sexist who asked the women to leave whenever he discussed business (of whatever kind); 2) that the defendant was embarrassed about his occupation or lack thereof (or regarded it as none of his "girlfriend's" business); and 3) that the defendant had actually <u>used</u> cocaine on occasion. The number of non-drug-dealing individuals who fit this description must be mind-boggling. But the public need have no fear. The Court's reasoning in this regard is limited to <u>Albert Perez</u>, and is not generally applicable to the rest of us. But next time, similar non-precedential reasoning may be applied to any other defendant -- unless the unconstitutional practice employed by the panel in this case is prohibited.

Court should vacate the order and "statement" and remand the case for rehearing before a different panel of the Court of Appeals.

II. The Admission into Evidence of Certain Hearsay Violated Petitioner's Rights Under Fed. R. Evid. 801(d)(2)(E) and the Confrontation Clause of the Sixth Amendment

The Government's case on the conspiracy count was based almost exclusively upon the testimony of Barry Lipsky, an admitted perjurer and murderer. Lipsky testified about his own involvement with Vincent Pacelli, Jr. in a narcotics operation, and, over objection, testified in narrative fashion that Pacelli told him that he (Pacelli) had just formed a partnership with petitioner and another. A motion was made to strike the answer. The court ruled that the testimony was taken subject to connection but never ruled on the motion to strike.

On appeal, petitioner urged that Lipsky's testimony of his conversation

with Pacelli which implicated the petitioner as a partner in the conspiracy was inadmissible hearsay and violated petitioner's right of confrontation.

The Court of Appeals ruled that the statement was admissible under the co-conspirator hearsay exception, Fed. R. Evid. 801(d)(2)(E). Rejecting the claim that the conviction was infirm because the trial court never ruled that Rule 801(d)(2)(E)'s prerequisites to admissibility had been satisfied, the Appeals Court itself found the record replete with independent evidence linking petitioner to the conspiracy charged. The Court of Appeals also rejected petitioner's claim that the admission of the testimony violated his rights under the Confrontation Clause, ruling apparently that no Confrontation Clause problem arises if sufficient indicia of reliability exist. It reasoned further

that a declaration in furtherance of a conspiracy is against penal interest and is, therefore, inherently reliable.

Rule 801(d)(2)(E) makes admissible against a party a statement by a co-conspirator during the course of and in furtherance of the conspiracy. Petitioner recognizes that the practicalities of trial may require that hearsay be admitted subject to connection, but maintains that, after all of the evidence is in, the trial judge must make his ruling on admissibility. As the Second Circuit itself has noted, when the trial judge abdicates his duty, the task of the appellate court "to perform the intellectual feat of assessing the independent evidence free from the color shed upon it by the hearsay" becomes even more difficult. United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970).

In recognition of those difficulties, several Circuits insist that the trial court explicitly determine, on the record, whether the challenged hearsay evidence is admissible. See, e.g., U. S. v. Radeker, 664 F.2d 242 (10th Cir. 1981); U. S. v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978); U. S. v. Macklin, 573 F.2d 1046, 1049 n.3 (8th Cir.), cert. denied, 439 U.S. 852 (1978). This Court should exercise it supervisory powers and make that rule uniform in all of the federal courts. The trial judge is the only person in a position to make the factual finding necessary to determine whether the hearsay falls within the exception; the Courts of Appeals are ill-equipped to perform this task for they have not heard the evidence and no appellate process can recreate the trial.

The weakness of the theoretical underpinnings of the co-conspirator

exception to the hearsay rule are well known; the agency theory is, in fact, but a fiction. An uncomfortable compromise has thus been worked out. Given the difficulty of proving conspiracy, the rule is tolerated because it is viewed as necessary. But, at the same time, this Court has insisted that it be strictly limited.

Thus, in 1949, this Court stated:

> This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy, has been scrupulously observed by the federal courts.

Krulewitch v. United States, 336 U.S. 440, 443-44 (1949). Subsequently, in Wong Sun v. United States, 371 U.S. 471 (1963), the Court said

> We have consistently refused to broaden that very narrow exception to the traditional hearsay rule which admits statements of a co-defendant made in furtherance of a conspiracy....

Undoubtedly, this insistence on a narrow exception flows in fact from recognition that a broad exception would violate rights protected by the Sixth Amendment's Confrontation Clause.

But it is clear that, far from scrupulously observing the limitations of the exception, courts in fact often rule "that anything related to the conspiracy is ... in furtherance of its objectives." Developments in the Law -- Criminal Conspiracy, 72 Harv. L. Rev. 920, 985 (1959). Similarly, the requirement of independent evidence of the defendant's membership in the conspiracy is not taken seriously, with the result that one charged with the serious crime of conspiracy has virtually no protection from unfair prosecution.

The Second Circuit's cavalier treatment of the relationship between the coconspirator's hearsay exception and the

Confrontation Clause only exacerbates the problem. Paying lip service to the rule that where confrontation and cross-examination are not available, other indicia of reliability must be present to justify admission of hearsay testimony, the Court automatically deduces reliability from the conclusion that the statements fall within the co-conspirator exception. Without a finding by the trial court that the challenged testimony actually falls within the co-conspirator exception, the argument necessarily falls of its own weight.

CONCLUSION

For the reasons set forth above, petitioner respectfully prays that this Court grant his petition for certiorari.

Respectfully submitted,

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May 2, 1983

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 504—August Term, 1982

(Argued November 22, 1982

Decided January 24, 1983)*

Filed February 22, 1983

Docket No. 82-1262

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ALBERT PEREZ,

Defendant-Appellant.

Before:

WATERMAN, PIERCE and WINTER,

Circuit Judges.

* This appeal, originally heard on November 22, 1982, was decided by summary order dated January 24, 1983. As such, it has no precedential value under our Local Rule § 0.23. Having construed appellant's petition for rehearing as a request, in part, for the January 24 order to be published, we have decided to publish it. *See O'Hara v. Long Island Railroad*, 665 F.2d 8 (2d Cir. 1981).

Appeal from a judgment of conviction in the United States District Court for the Southern District of New York, Milton Pollack, *J.*, entered on July 7, 1982, after a jury trial.

Affirmed.

MARK F. POMERANTZ, Special Assistant United States Attorney for the Southern District of New York (John S. Martin, Jr., United States Attorney for the Southern District of New York) *for Plaintiff-Appellee.*

ALAN M. DERSHOWITZ, Cambridge, MA (Goldberger, Feldman, Dubin, & Weisenfeld, P.C., New York, New York; Nathan Z. Dershowitz, New York, NY, of Counsel) *for Defendant-Appellant.*

PER CURIAM:

This is an appeal from a judgment of conviction in the United States District Court for the Southern District of New York entered after a three-day jury trial before Judge Milton Pollack.

On September 20, 1973, appellant was indicted as a member of a conspiracy involving twelve named and various unnamed co-conspirators engaged in a scheme to distribute narcotics in violation of 21 U.S.C. § 841(a)(1). The named defendants included, among others, Vincent

Pacelli, Jr., Alfred Catino, a/k/a "Herbie," Al Bracer, Albert Perez, a/k/a Abbe Perez, Edgardo Ramirez, and John Fazzalari, a/k/a "Fuzzy." Others named as co-conspirators, but not as defendants, included Herbert Sperling and Barry Lipsky.

Perez was not arrested with the other cc nspirators because he had fled the country in the latter part of 1972. He was not arrested for his role in the conspiracy until April 13, 1979, in Scottsdale, Arizona. On April 16, 1979, Perez was removed to New York to face the narcotics charges lodged against him in the 1973 indictment. Prior to trial he again fled the authorities, and a separate indictment charging bail jumping was filed on December 27, 1979, pursuant to 18 U.S.C. § 3150. Perez eluded apprehension until March 10, 1982, when he was rearrested in New York City. He was tried before a jury on the narcotics and bail jumping indictments from May 17 through May 19, 1982.

At trial, the goverment introduced evidence of a narcotics conspiracy involving Perez and two other principal partners, Vincent Pacelli and Al Bracer. Also presented was the testimony of co-conspirator Barry Lipsky who testified, *inter alia*, to an out-of-court declaration in which Pacelli told him that "he [Pacelli] had just formed a partnership with Abbe Perez and Al Bracer. . . ." (Tr. 37). Further, Lipsky testified concerning his participation in conversations with Pacelli and Perez in which the three men discussed their narcotics transactions. (Tr. 58-59).

Other evidence presented by the government regarding Perez' involvement in the conspiracy included testimony by narcotics agents, Joseph Salvemini and Gerald Smith, about their observations of Perez during the pertinent period. In addition, Perez' former girlfriend, Emily Flores, testified that numerous meetings took place at

their apartment at which Pacelli, Lipsky, Bracer and Perez were present.

At the termination of the jury trial, appellant was convicted of conspiracy to distribute narcotics in violation of 21 U.S.C. § 841(a)(1). Appellant was also convicted of failing to appear for trial in violation of 18 U.S.C. § 3150.

On appeal from the former, Perez contends that Lipsky's testimony as to the conversation between Pacelli and Lipsky, which implicated Perez as a partner in the drug conspiracy, was inadmissible hearsay and that its admission violated Perez' right of confrontation. Since we find the statement admissible under the co-conspirator's hearsay exception, Fed.R.Evid. 801(d)(2)(E), we reject appellant's contentions and affirm the judgment of conviction.

The law in this circuit regarding the admissibility of declarations made by co-conspirators is set forth in *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). In *Geaney*, Judge Friendly wrote:

> [w]hile the practicalities of a conspiracy trial may require that hearsay be admitted "subject to connection," the judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances.

Id. at 1120. Thus, a *Geaney* finding as to the existence of a conspiratorial relationship between the declarant and the defendant must be shown *aliunde* of the hearsay statement itself. *See also United States v. Ziegler*, 583 F.2d

77, 79-80 (2d Cir. 1978); *United States v. Mangan*, 575 F.2d 32, 42 (2d Cir.), *cert. denied*, 439 U.S. 931 (1978).

Appellant argues that Lipsky's inadmissible hearsay testimony was the only proof linking Perez to the conspiracy. Therefore, he contends, there was no independent evidence to support admission of Lipsky's testimony.

Contrary to appellant's assertion, we find the record replete with direct and corroborative evidence, independent of Lipsky's hearsay testimony, which links Perez to the conspiracy charged. Amid Lipsky's non-hearsay testimony in his statement that he, Perez and Pacelli met frequently to handle the affairs of the drug business (Tr. 58-59); that he saw Perez present when money from narcotics sales was counted at Marge Jackalone's apartment (Tr. 67-68); that he saw Perez present at the 118th Street apartment of Frank Bassi, Jr., when money from narcotics sales was counted (Tr. 70); that he, Perez and Pacelli drove to the Jack-in-the-Box restaurant in the Bronx on more than one occasion to pick up cocaine (Tr. 73-74); that on one occasion, he and Pacelli went to Second Avenue and 115th Street to "borrow" dilutant from Perez, "Skinny Herbie" and "Fuzzie" (Tr. 81-82); that he was told to make up thin polyethylene bags of cocaine so that they might be sewn into Perez' jacket for Perez' trip to Spain, and did so (Tr. 84-86); that he saw Perez present when two women altered Perez' jacket to accommodate the bags of cocaine (Tr. 86); that on more than one occasion he and Pacelli went to L & A Sporting Goods store, jointly owned by Perez, Pacelli and Nick Lugo, and talked to Perez about the operations of the drug business (Tr. 95); that on one occasion, he drove with Perez to meet co-conspirators Edgardo Ramirez and Jack and Eddie Bless, the latter two being persons to whom the partnership sold cocaine and from whom they

received heroin (Tr. 113); that on that same occasion he saw Jack Bless hand an object to Perez shortly before Perez handed to Lipsky a set of car keys and a claim check to a car which contained four half-kilo bags of heroin (Tr. 116-19); that he had personal knowledge of the contents of the half-kilo bags because he had weighed and tested the heroin for purity (Tr. 119); that Pacelli summoned him to a discotheque where Lipsky saw the three partners—Pacelli, Perez and Bracer—seated together (Tr. 118); and that Perez gave Lipsky money to leave New York, to enable Lipsky to avoid arrest (Tr. 125-26).

Lipsky's testimony linking Perez to Pacelli and Bracer was corroborated through a number of sources. A drug enforcement agent testified that he had participated in a drug sale at Perez' and Pacelli's sporting goods store where cocaine was in open view when Perez walked in, glanced at the agent, gave a half nod of his head and smiled before leaving (Tr. 350-55). The agent's testimony concerning the sale at the sporting goods store mirrored Lipsky's account of the sale as told by Pacelli (Tr. 101-02). The Government also presented evidence to show and appellant does not dispute, that Perez travelled to the Grand Canary Islands under a false name, where he met with co-conspirator Al Bracer. (GX 17; Tr. 336-39). Emily Flores, Perez' former girlfriend, testified that whenever Perez and Pacelli met at Perez' apartment for conversations, they would ask her to leave the room (Tr. 303-04); that Perez never told her what he did for a living (Tr. 331-32); and that she had personally seen Perez use cocaine (Tr. 315).

Although each item of evidence itself may not be dispositive proof that Perez was a co-conspirator, "such pieces of evidence are to be viewed not in isolation but in

conjunction." *United States v. Geaney, supra*, 417 F.2d at 1121.

Appellant next argues that the district judge committed error when he did not make a specific *Geaney* finding as to Perez' participation in the conspiracy. We disagree. This circuit has recognized that where the record indicates it to be appropriate, an implicit *Geaney* ruling can be inferred in the trial judge's decision to receive the evidence and to deny a directed verdict of acquittal on the conspiracy charge. *See, e.g., United States v. Cambindo Valencia*, 609 F.2d 603, 631 (2d Cir. 1979), *cert. denied*, 446 U.S. 940 (1980); *United States v. Lyles*, 593 F.2d 182, 194 n.15 (2d Cir.), *cert. denied*, 440 U.S. 972 (1979); *United States v. Ziegler, supra*, 583 F.2d at 80 n.5. In light of the abundance of evidence linking Perez to the conspiracy, we infer that an implicit finding has been made.

Appellant's claim that the admission of Pacelli's statements violated his right of confrontation under the Sixth Amendment is unavailing. In order to protect a defendant's right to challenge evidentiary statements when the declarant is unavailable, the judge must determine whether, in the circumstances of the case, the statement "bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration." *United States v. Puco*, 476 F.2d 1099, 1107 (2d Cir.) (On petition for rehearing), *cert. denied*, 414 U.S. 844 (1973). Further, "[i]n most cases the determination that a declaration is in furtherance of the conspiracy . . . will decide whether sufficient indicia of reliability were present." *Id.* at 1107; *accord, United States v. Wright*, 588 F.2d 31, 38 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); *United States v. Mangan, supra*, 575 F.2d at 44. This is true because a declaration in

furtherance of a conspiracy would be against the penal interest of the declarant. *Cf. United States v. Glasser*, 443 F.2d 994, 999 (2d Cir. 1971).

It is clear that Pacelli's statement to Lipsky concerning the formation of the partnership was in furtherance of the charged conspiracy. Pacelli was imparting to Lipsky the composition of a partnership in which Lipsky was to act as a principal worker. In order to prepare Lipsky for his intended role, Pacelli had to reveal the identity of the others involved. Thus, we find Pacelli's statements to be in furtherance of the conspiracy, and conclude that the jury as triers of fact had an adequate basis for evaluating the truth of the declaration.

Appellant's claim that under the Jencks Act he is entitled to a reversal because he was denied an unredacted version of an eight page letter Lipsky had written to Assistant United States Attorney Feffer is also to no avail. There is no indication that the Government deliberately misplaced the two missing pages. Moreover, the significance of the missing pages is minimal when weighed against the strength of the Government's proof. *See United States v. Grammatikos*, 633 F.2d 1013, 1019-20 (2d Cir. 1980); *United States v. Miranda*, 526 F.2d 1319, 1326 (2d Cir. 1975), *cert. denied*, 429 U.S. 821 (1976). The Government's explanation that after a 10 year hiatus, while Perez was at large, the two missing pages could not be located, is plausible. We note that the remainder of the letter's contents was vigorously used by Perez' counsel in his attempt to impeach Lipsky's character. Appellant's counsel, during cross-examination of Lipsky, used the redacted version of the letter to expose Lipsky's prior perjuries and participation in a murder, as well as the preferential treatment Lipsky had received while incarcerated.

The appellant's remaining claims are without merit. First, he claims that the government attempted to improperly bolster Lipsky's credibility during its summation by referring to evidence which had been excluded at trial. The appellant did not object to the summation at trial; therefore, this court's inquiry is directed at whether the challenged argument amounted to a "flagrant abuse." *United States v. Perry*, 643 F.2d 38, 51 (2d Cir. 1981); *United States v. Dibrizzi*, 393 F.2d 642, 645-46 (2d Cir. 1968). The prosecutor's statement did not refer to excluded evidence but rather, to Lipsky's testimony that he had contacted the federal law enforcement authorities prior to corroboration of his allegations. We do not find this to be flagrant abuse. Second, the appellant objects to certain aspects of the jury charge. He claims that the district court committed prejudicial error by informing the jury as to the statutory purpose of the Comprehensive Drug Abuse Prevention Act, the dangers of a conspiracy, and the fact that co-conspirator Susan Weyl had previously pleaded guilty to conspiracy with Perez, Pacelli, Lipsky and others, when in fact she had not named Perez. This was not reversible error. A charge on statutory purpose is not an abuse of discretion. *United States v. O'Connor*, 580 F.2d 38, 44 (1978). Moreover, appellant does not dispute the accuracy of the district judge's statement concerning the statutory purpose of the Act. The charge regarding the dangers of a conspiracy was given to convey to the jury the intricacies of a conspiracy conviction and the fact that a conspiracy can be viewed as a separate offense from the substantive charges. The trial judge's inadvertent reference to Perez' name while discussing Susan Weyl's plea was not met with objection by the defendant. Under these circumstances, Perez may not object to this portion of the charge on appeal. *See United*

States v. Head, 546 F.2d 6, 7-8 (2d Cir. 1976), *cert. denied*, 430 U.S. 931 (1977). Furthermore, the judge's error was remedied by the balance of the charge which instructed the jury that regardless of the other co-conspirators' guilt or innocence, they must independently determine whether Perez was a member of the charged conspiracy.

Judgment of conviction is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

CORRECTED ORDER

No. 504 Docket No. 82-1262

August Term, 1982

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

--v.--

ORDER DENYING REHEARING

ALBERT PEREZ,

Defendant-Appellant.

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Before:

WATERMAN, PIERCE and WINTER,

Circuit Judges.

Believing that a formal opinion would serve no jurisprudential purpose, the court affirmed petitioner's conviction by summary order pursuant to our Rule § 0.23. That rule provides, in part, that

because such orders "do not constitute formal opinions of the court and are unreported and not uniformly available to all parties," they may not be cited as a precedent in unrelated cases. Petitioner argues in his petition for rehearing that such a procedure violates the Constitution and federal common law. We disagree. Petitioner has not, however, moved that the order be published, a practice generally acceded to, when requested by a litigant. Nevertheless, construing petitioner's papers liberally as such a request, we grant it. The order will be published verbatim but for the addition of a footnote indicating that it was originally decided by summary order, and, as such, it had no precedential value under Local Rule § 0.23. See O'Hara v. Long Island Railroad, 665 F.2d 8 (2d Cir. 1981). Since we disagree with petitioner's contention that the use of a

summary order violates the Constitution and federal common law, and since we direct that the order be published, the petition for rehearing is denied.

HONORABLE STERRY R. WATERMAN

HONORABLE LAWRENCE W. PIERCE

HONORABLE RALPH K. WINTER

Circuit Judges.